

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 19, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP873-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 2012CF987**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DEREK J. HAINES,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Waukesha County: WILLIAM DOMINA, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Derek J. Haines appeals from a judgment of conviction and an order denying his motion to modify sentence. He contends that

his statutory ineligibility for the Substance Abuse Program (SAP)<sup>1</sup> is a new factor warranting sentencing modification. We disagree with Haines and affirm the judgment and order.

¶2 In 2012, Haines was convicted following a guilty plea of one count of battery by a prisoner in violation of WIS. STAT. § 940.20(1) (2011-12).<sup>2</sup> The circuit court sentenced him to eighteen months of initial confinement and two years of extended supervision.

¶3 At sentencing, the circuit court indicated that Haines' character was largely defined by his drug history and that, when high or using, he was a danger to himself and the community. Accordingly, it made him eligible for the SAP, which allows prisoners to convert initial confinement time to extended supervision time if they successfully complete the program, thereby reducing their time in confinement without reducing their overall sentence. *See* WIS. STAT. § 302.05(3)(c).

¶4 After sentencing, the department of corrections wrote the circuit court to inform it that Haines was not eligible for the SAP because he had been convicted of a statutorily excluded offense. *See* WIS. STAT. § 302.05(3)(a)1. Consequently, the court amended Haines' judgment of conviction to remove his eligibility for the SAP.

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<sup>1</sup> The SAP was formerly known as the Earned Release Program. *See* 2011 Wis. Act 38, § 19.

<sup>2</sup> All references to the Wisconsin Statutes are to the 2011-12 version.

¶5 Haines subsequently moved to modify his sentence, arguing that his statutory ineligibility for the SAP was a new factor warranting sentencing modification. The circuit court denied the motion in an oral ruling. The court concluded that despite the fact that it did not know that Haines was ineligible for the SAP, his ineligibility “doesn’t rise to the level of being a new factor because it does not undercut [the court’s] intent in providing the original sentence.” The court stated in relevant part:

[W]henever I have somebody with a substance abuse problem in front of me I try to include consideration for that issue in the context of the sentence that I provide.

....

The Court was not aware at the time of sentencing that battery by a prisoner was an ineligible conviction for that programming. That wasn’t something I was focused on....

My logic in applying that as an opportunity for the defendant and the potential of him gaining consideration I understood was that the defendant as a drug addict would be in a better place and the community would be in a better place if he were to obtain programming in the institution and if part of that programming resulted in consideration of reduction of sentence that we would be, the community, in a safer place with the defendant released into the community with that programming. In other words, he’d be less likely to be an active drug addict at the time and more likely to be successful in sobriety.

The Court’s analysis was that the sentence that should be imposed was a period of three years and six months, one and a half years initial confinement followed by ... two years of extended supervision. My conclusion at the time of sentencing was that was the appropriate sentence for the acts committed in this case.

Any consideration for reduction was really related to the potential of the defendant being in a less risky position because of the available programming or because of programming that would be or could be made available to him. If that program is not available to him because ...

he's statutorily ineligible ... my conclusion is that the appropriate sentence was exactly what we meted out.

So I don't see the ... ineligibility for substance abuse programming, to be a new factor that would affect the Court's sentence in this case. Now, I understand that that's maybe frustrating. It's certainly frustrating to me.

....

In other words, I would prefer that Mr. Haines would be less likely a drug addict, active drug addict upon his release, but because he can't take advantage of a program which would reduce that concern that the Court has then the sentence that I provided originally is reinforced because I don't have the advantage and he doesn't have the advantage of demonstrating capacity for a lower risk.

So that programming while I focused on it [at sentencing] and I focused on it in my comments here today is not something that I considered to ... meet the standard of being a new factor to undercut the Court's intent relative to the original sentence.

¶6 The circuit court then issued a written order denying the motion to modify sentence. This appeal follows.

¶7 A circuit court may modify a defendant's sentence upon a showing of a new factor. *See State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The analysis involves a two-step process. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *Id.*, ¶36. Second, the defendant must show that the new factor justifies sentence modification. *Id.*, ¶¶37-38. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." *Id.*, ¶40 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently.

*See id.*, ¶33. Whether a new factor warrants sentence modification is a discretionary determination for the circuit court. *See id.*, ¶¶37, 66.

¶8 Here, we are satisfied that the circuit court properly denied Haines' motion to modify sentence for two reasons. First, Haines' SAP ineligibility is not a new factor because it was not highly relevant to the imposition of his sentence. As explained by the circuit court, "Any consideration for reduction was really related to the potential of the defendant being in a less risky position because of ... programming that would be or could be made available to him." Thus, without the desired programming, the appropriateness of Haines' original sentence was reinforced.

¶9 Second, even if Haines' SAP ineligibility did constitute a new factor, it would not justify sentence modification for the same reason. Again, the circuit court indicated that Haines' character was largely defined by his drug history and that, when high or using, he was a danger to himself and the community. If the unavailability of treatment meant that Haines would continue as a drug addict, then the interest in public safety demanded a longer custodial sentence, not a shorter one.

¶10 For these reasons, we affirm the judgment and order of the circuit court.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

